Summary of Contents

12.1 Purpose of Trials in Child Protective Proceedings

For purposes of child protective proceedings, a "trial" is the fact-finding adjudication of a charge contained in an authorized petition* to determine if the minor comes within the jurisdiction of the court. MCR 5.903(A)(19). Child protective proceedings are civil, not criminal, in nature. MCL 712A.1(2); MSA 27.3178(598.1)(2).

*See Section 7.16 for a discussion of authorization for filing of petitions.

If the factfinder concludes that the child is not within the jurisdiction of the court, the court must dismiss the petition. MCL 712A.18(1); MSA 27.3178(598.18)(1), and *In re Mathers,* 371 Mich 516, 531–32 (1963).

If the factfinder concludes that the child is within the jurisdiction of the court, The court may:

*See Section 13.24.

- order one or more of the dispositional alternatives contained in MCL 712A.18(1); MSA 27.3178(598.18)(1),* that are appropriate for the welfare of the child and society in view of the facts proven and ascertained, and

*See also Sections 7.23 and 13.21 for discussion of the court's authority over "nonparent adults."

- make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of the child or children under its jurisdiction. MCL 712A.6; MSA 27.3178(598.6). The authority to fashion remedies under MCL 712A.6; MSA 27.3178(598.6), extends beyond MCL 712A.18; MSA 27.3178(598.18), which provides dispositional alternatives. *In re Macomber,* 436 Mich 386, 389–93, 398–400 (1990). See also *In re Jacobs,* 433 Mich 24, 38 (1989) ("adjudicative" or "jurisdictional" phase of protective proceedings involves substantial effort to reunify family in an appropriate case).*

See also SJI2d 97.15 (court will determine an appropriate disposition for a child found by a jury to be within the jurisdiction of the court).

12.2 Combined Adjudicative and Dispositional Hearings

*See Section 13.19 for a detailed discussion of Case Service Plans.

Under MCR 5.973(A)(2), the interval between a trial and dispositional hearing is within the court's discretion (though not to exceed 35 days when the child is in placement); therefore, the two hearings may be combined if necessary preparations are completed prior to the hearing. Most importantly, a Case Service Plan must be prepared prior to the hearing. See MCR 5.973(A)(4)(a).* The parties may demand a jury only for the adjudicative or trial phase of the combined hearing, not the dispositional phase. MCR 5.911(A).

12.3 Demand for Jury Trial or Trial by Judge

The right to a jury exists only at a trial to determine whether the child is within the jurisdiction of the court; there is no right to a jury during the dispositional phase of proceedings, which includes hearings to determine whether parental rights should be terminated. MCR 5.911(A), *In the Matter of Rebecca Oakes,* 53 Mich App 629, 631–32 (1974), and *In re Mathers,* 371 Mich 516, 531 (1963).

MCR 5.911(B) provides that a party may demand a jury trial by filing a written demand with the court. The demand must be filed within 14 days after the court gives notice of the right to a jury trial or 14 days after the appearance of counsel, whichever is later. The demand must be filed no later than seven days before trial, but the court may excuse a late filing in the interest of justice. See, generally, *In re Hubel,* 148 Mich App 696, 697–701 (1986). MCL 712A.17(2); MSA 27.3178(598.17)(2), provides that any person interested in the hearing may demand a jury, or the court, on its own motion, may order a jury to try the case.

Similarly, MCR 5.912(B) states that a party may demand that a judge rather than a referee serve as factfinder at a nonjury trial by filing a written demand

with the court. The demand must be filed within 14 days after the court has given the parties notice of their right to have a judge preside, or 14 days after the appearance of counsel, whichever is later. The demand must be made no later than seven days before trial, but the court may excuse a late filing in the interest of justice.

A judge must preside at a jury trial. MCR 5.912(A)(1)(a). Disqualification of a judge is governed by MCR 2.003. MCR 5.912(C).

Unless a party has demanded a trial by judge or jury, a referee may conduct the trial and further proceedings through the dispositional phase. MCR 5.913(B).

Only referees who are licensed to practice law in Michigan may conduct child protective proceedings other than preliminary inquiries, preliminary hearings, and progress reviews. MCR 5.913(A)(3). Thus, a referee must be licensed to practice law in Michigan to preside over a bench trial.

Referees may administer oaths and examine witnesses, and, if a case requires a hearing and taking of testimony, the referee must make a written signed report to the judge containing a summary of the testimony taken and a recommendation for the court's findings and disposition. MCL 712A.10(1)(b)–(c); MSA 27.3178(598.10)(1)(b)–(c). Referees do not have authority to enter orders.

12.4 Time Requirements

If the child is not in placement, the trial must be held within six months after the filing of the petition. If the child is in placement, the trial must commence as soon as possible but not later than 63 days after the placement unless the trial is postponed in the manner described below. MCR 5.972(A). "Placement" means court-approved removal of the child from the parental home and placement in foster care, a shelter home, a hospital, or with a private treatment agency, not placement by a parent with a relative. MCR 5.903(C)(6). "Placement" typically occurs at the preliminary hearing.*

*See Chapter 8.

MCR 5.972(A)(1) allows for postponement of the trial upon stipulation of the parties. However, MCL 712A.17(1); MSA 27.3178(598.17)(1), which was amended in 1997, allows the court to adjourn a hearing or grant a continuance in a child protective proceeding only for good cause with factual findings on the record and not solely upon stipulation of counsel or for the convenience of a party. See 1997 PA 169. Therefore, the trial court may not postpone trial solely upon stipulation of counsel. See MCR 1.104 (rules of practice in a statute are effective until superseded by court rule).

Note 1: Although postponement of the trial upon stipulation of the parties is prohibited by the statutory amendments referenced above, it may still be possible for the parties to waive the requirement that they be given 14 days' notice prior to the hearing on adjournment. See the procedural requirements described immediately below. If a party's motion to adjourn is uncontested, the trial may be adjourned if the court makes the required findings on the record.

In addition to the factual finding of good cause, the court shall not adjourn the hearing or grant a continuance unless one of the following is also true:

(a) The motion for adjournment or continuance is made in writing not less than 14 days before the hearing,

(b) The court grants the adjournment or continuance upon its own motion after taking into consideration the child's best interest. An adjournment or continuance granted under this subdivision shall not last more than 28 days unless the court states on the record the specific reasons why a longer adjournment or continuance is necessary.

MCL 712A.17(1)(a)–(b); MSA 27.3178(598.17)(1)(a)–(b).

The court rule governing adjournments and continuances, MCR 5.923(G), states that at each stage of a child protective proceeding, the court must adhere to the time limits specified in the rules. Adjournments or continuances of trials or hearings shall be granted only:

(1) on written motion of a party filed no later than 14 days prior to the hearing, or

(2) on motion of the court for good cause, for a period not to exceed 28 days, taking into consideration the best interests of the child.

MCR 5.923(G)(1)–(2). Thus, the court rule does not require factual findings of good cause to be made on the record, and requires good cause for the adjournment or continuance only when the motion is made by the court.

Note 2: The statutory amendment became effective March 31, 1998. See 1997 PA 169. The court rule provisions were ordered to be effective April 1, 1998. See 456 Mich ccxii–ccxiii, ccxv (1998). Therefore, the court rule provisions governing adjournments and continuances supersede those in the statute. MCR 1.104.

The court may also postpone a trial where process cannot be completed or where the court finds that the testimony of a presently unavailable witness is needed. MCR 5.972(A)(2)–(3). These reasons may constitute "good cause" for adjournment or continuance under MCL 712A.17(1); MSA

27.3178(598.17)(1). When trial is postponed for one of these reasons, the court must release the child to the parent unless the court finds that it will likely result in physical harm or serious emotional damage to the child. MCR 5.972(A).

12.5 Notice Requirements

Unless the party was previously served with a summons, a summons is required for trials. It must be served on the parent or person with whom the child resides, other than a court-ordered custodian. If the person summoned is not the parent or, in the case of a hearing to terminate parental rights, the respondent, the parent or respondent must be notified as required by MCR 5.920(B)(4). MCR 5.921(B)(2)(a) and (c).*

*See Chapter 5 for a detailed discussion of notice requirements in child protective proceedings.

If a prior court appearance of the party in the case was in response to service by summons, notice of trial may be by notice of hearing. MCR 5.920(F). After a party's first appearance before the court, subsequent notices of hearings may be served on the party or the party's attorney. MCR 5.920(F). Substituted service is appropriate in limited circumstances where personal service is impracticable or cannot be achieved. MCR 5.920(B)(4)(b)–(c).

12.6 Parties Who May Be Present at Trial

Before proceeding, the court must determine that the proper parties are present. MCR 5.972(B). "Parties" include the petitioner, child, respondent-parent, or other parent or guardian in a child protective proceeding. MCR 5.903(A)(13). The respondent-parent has the right to be present, but the court may proceed in his or her absence provided that notice has been served on him or her. The child may be excused as the court determines the child's interests require. MCR 5.972(B).

It is error for a judge or referee to conduct an in-camera interview of a child witness, thereby excluding parties from trial proceedings. *In re Crowder*, 143 Mich App 666, 668–71 (1985) (rule allowing for in-camera interviews of children in custody cases does not apply in child protective proceedings).

A member of a local Foster Care Review Board must be admitted to a trial. MCL 712A.17(6); MSA 27.3178(598.17)(6).*

*See Benchnote 8 for a detailed discussion of the role of the FCRB.

12.7 Appearance of Prosecuting Attorney

If the court requests, the prosecuting attorney must appear at any proceeding. MCR 5.914(A). In addition, if requested by the Family Independence Agency or an agent under contract with the FIA, the prosecuting attorney must act as legal consultant for the FIA or its agent at all stages of the proceedings. If the prosecuting attorney does not appear on behalf of the FIA or its agent, the FIA may contract with an attorney of its

choice. MCL 712A.17(5); MSA 27.3178(598.17)(5). Thus, the prosecuting attorney may appear at trial.

12.8 Appointment of Attorney for Respondent*

*See Section 7.9 for a more detailed discussion.

At the respondent's first court appearance, the court must advise the respondent of the right to retain an attorney to represent him or her at any hearing and that:

(i) the respondent has the right to a court-appointed attorney if the respondent is financially unable to retain counsel, and

(ii) if the respondent is not represented by an attorney, the respondent may request and receive a court-appointed attorney at any later hearing.

MCR 5.915(B)(1)(a)(i)–(ii) and MCL 712A.17c(4)(a)–(c); MSA 27.3178(598.17c)(4)(a)–(c).

12.9 Appearance of Lawyer-Guardian Ad Litem for Child

*See Sections 7.10–7.11 for a detailed discussion of the powers and duties of lawyer-guardians ad litem.

The court must appoint a lawyer-guardian ad litem to represent the child, and the child may not waive the assistance of a lawyer-guardian ad litem. MCL 712A.17c(7); MSA 27.3178(598.17c)(7). MCL 712A.17d(1)(g); MSA 27.3178(598.17d)(1)(g), provides that the lawyer-guardian ad litem must attend all hearings, including trials, and substitute representation for the child only with court approval.*

12.10 Appointment of Guardians Ad Litem*

*See Section 7.13 for a detailed discussion.

The court may appoint a guardian ad litem for the child. MCL 712A.17c(10); MSA 27.3178(598.17c)(10). In addition, if the court finds that the welfare of a party requires it, the court may appoint a guardian ad litem for that party. MCR 5.916(A).

12.11 Rules of Evidence and Standard of Proof*

*See Chapter 11 for a detailed discussion of common evidentiary issues in child protective proceedings.

The rules of evidence for a civil proceeding apply at trial, except that:

*See Section 11.7.

F a hearsay statement made by a child under 10 years of age and not otherwise admissible may be admitted at trial under certain circumstances. MCR 5.972(C)(2),* and

F any legally recognized privileged communication except that between attorney and client is abrogated in protective proceedings. MCL 722.631; MSA 25.248(11).*

*See Section 11.4.

See MCR 5.972(C)(1).

The standard of proof at trial is a preponderance of the evidence, notwithstanding that the original petition contains a request to terminate parental rights. MCR 5.972(C)(1). However, the standard of proof required to terminate parental rights is "clear and convincing evidence," or, if an Indian child is the subject of the proceedings, "beyond a reasonable doubt."*

*See Section 11.3 for a table summarizing standards of proof at various stages of child protective proceedings. For proceedings involving Indian children, see Chapter 20.

12.12 Preliminary Procedures

The court may conduct the trial in an informal manner. MCL 712A.17(1); MSA 27.3178(598.17)(1).

Unless waived, the court must read the allegations in the petition, and the court must explain the nature of the proceedings. MCR 5.972(B)(2).

12.13 Jury Procedures Generally

Juries in child protective proceedings consist of six jurors. MCL 712A.17(2); MSA 27.3178(598.17)(2).*

*See Section 12.17, below (verdict may be received when five of six jurors agree).

The jury must be summoned and impaneled in accordance with Chapter 13 of the Revised Judicature Act, MCL 600.1300–600.1376; MSA 27A.1300–27A.1376.

In child protective proceedings, jury procedure is governed by MCR 2.510–2.516, except as provided in MCR 5.911(C)(2) and (3), which contain specific rules governing peremptory challenges and verdicts.*

*See Sections 12.14 (peremptory challenges) and 12.17 (verdicts), below.

The jury procedure rules for civil cases are as follows:

2.510 Juror Personal History Questionnaire

2.511 Impaneling the Jury

2.512 Rendering Verdict

2.513 View

2.514 Special Verdicts

2.515 Motion for Directed Verdict*

*See Section 12.16, below.

2.516 Instructions to Jury*

*See Section 12.15, below.

12.14 Peremptory Challenges in Jury Trials

MCR 5.911(C)(2)(a) provides that in a child protective proceeding, each party is entitled to five peremptory challenges, and the child is to be considered a separate party. Two or more parties on the same side are considered a single party for purposes of peremptory challenges. MCR 5.911(C)(3).

When two or more parties are aligned on the same side and have adverse interests, the court shall allow each such party represented by a different attorney three peremptory challenges. MCR 5.911(C)(3)(a). In such cases, the court may allow the opposite side the same number of challenges allowed the multiple parties. MCR 5.911(C)(3)(b). Thus, for example, if each of two respondent-parents presents claims adverse to the other and is represented by a different attorney, each should be allowed three peremptory challenges, and the child and petitioner should be allotted six peremptory challenges each.

If the court denies a challenge for cause and counsel is forced to use a peremptory challenge to excuse the juror, and if counsel later finds a prospective juror objectionable but has exhausted all peremptory challenges, counsel must state on the record reasons for the objection. A motion for additional peremptory challenges may be used to raise such an objection. *Poet v Traverse City Osteopathic Hosp*, 433 Mich 228, 239–41 (1989).

12.15 Jury Instructions

A. Use of Standard Jury Instructions

MCR 2.516(D) governs the creation and use of Standard Jury Instructions. In 1998, standard jury instructions for child protective proceedings were created. See SJI2d 97.01–97.15. Pertinent portions of these and other standard instructions must be given to the jury if:

(a) they are applicable,

(b) they accurately state the applicable law, and

(c) they are requested by a party.

MCR 2.516(D)(2)(a)–(c).

B. Requests for Instructions

At a time the court reasonably directs, the parties must file written requests for instructions. In the absence of a direction from the court, a party may file a written request at or before the close of proofs. MCR 2.516(A)(1). The requests must be served on adverse parties in accordance with MCR 2.107, and the court must inform the attorneys of its proposed action on the requests before their arguments to the jury. MCR 2.516(A)(3)–(4).

Also, after the close of proofs, each party must submit to the court in writing a concise narrative statement of disputed issues in the case. The statement must set forth as issues only those disputed propositions of fact supported by the evidence. The parties may also submit their theories of the case as to each issue. MCR 2.516(A)(2). The court need not give these statements to the jury in the form presented if the court does present to the jury the material substance of the issues and theories of each party. MCR 2.516(A)(5) and MCR 2.516(B)(3).

C. Objections to Instructions

Under MCR 2.516(C), in order to assign as error the giving of or the failure to give an instruction, a party must object on the record before the jury retires to deliberate or to resume deliberations if the instruction was given after deliberations have begun. However, the party must be given an opportunity to make the objection outside the jury's presence.

Note: It is advisable to conduct a "sidebar" with counsel to determine if they have objections to the instructions before the jury retires for deliberations.

D. Providing the Jury With a Copy of the Instructions

A full set of written or recorded instructions may be provided to the jury. A partial set of written or recorded instructions may be provided if the parties agree that a partial set may be provided and agree on the portions to be provided. MCR 2.516(B)(5).

12.16 Motions for Directed Verdict in Jury Trials

MCR 2.515 allows for a motion for directed verdict to be made at the close of the evidence offered by an opponent. Because the petitioner has the burden of proof, the respondent-parent may move for a directed verdict at the close of the petitioner's proofs, or the parent may wait until all of the proofs have been presented. See SJI2d 97.03–97.04, and *In the Matter of Taurus F*, 415 Mich 512 (1982) (petitioner has burden of proving that a child falls within the jurisdiction of the court). The motion must be supported by specific grounds. If the motion is denied, the moving party may offer evidence without having reserved the right to do so. Denial of a motion for directed verdict does not constitute waiver of trial by jury. MCR 2.515.

The judge may grant a motion for directed verdict only "when the evidence does not establish a prima facie case and reasonable persons would agree that there is an essential failure of proof." *Auto Club Ins Assoc v General Motors Corp*, 217 Mich App 594, 601 (1996). The evidence and all legitimate inferences that may be drawn from it must be viewed in a light most favorable to the nonmoving party. *Caldwell v Fox*, 394 Mich 401, 407 (1975).

12.17 Taking the Verdict in Jury Trials

MCR 5.911(C)(2)(b) states that a verdict in a case tried by six jurors will be received when five jurors agree. A party may require the jury to be polled. If the number of jurors agreeing is less than required, the jury must be sent out for further deliberation. MCR 2.512(B)(2)–(3). The court may discharge a jury from the action:

(1) because of an accident or calamity requiring it;

(2) by consent of all parties;

(3) whenever an adjournment or mistrial is declared; or

(4) whenever the jurors have deliberated until it appears that they cannot agree.

MCR 2.512(C)(1)–(4). The court may order another jury to be drawn, and the same proceedings may be had before the new jury as might have been had before the jury discharged.

12.18 Court's Authority to Call Additional Witnesses

If at any time the court believes that the evidence has not been fully developed, it may:

(1) examine a witness;

(2) call a witness; or

(3) adjourn the matter before the court, and

(a) cause service of process on additional witnesses, or

(b) order production of other evidence.

MCR 5.923(A)(1)–(3). See *In re Alton*, 203 Mich App 405, 407–08 (1994) (court allowed additional testimony that directly addressed key conflicts between the testimony of the complainant and juvenile).

Neither the court nor another party to the case may call a lawyer-guardian ad litem as a witness to testify regarding matters related to the case. MCL 712A.17d(3); MSA 27.3178(598.17d)(3). A lawyer-guardian ad litem's case file is not discoverable. *Id.**

*These rules are effective March 1, 1999. 1998 PA 480. See Section 7.11 (powers and duties of lawyer-guardians ad litem).

12.19 Appointment of Impartial Questioner

The court may appoint an impartial psychologist or psychiatrist to ask questions of a child witness at a hearing. MCR 5.923(F).

12.20 Alternative Procedures to Obtain Testimony of Child Witnesses

MCR 5.923(E) provides that the court may allow the use of closed-circuit television, speaker telephone, or other similar electronic equipment to facilitate hearings or to protect the parties. The court may allow the use of videotaped statements and depositions, anatomical dolls, support persons, and take other measures to protect the child witness as authorized by, and enumerated in, MCL 712A.17b; MSA 27.3178(598.17b).*

*See Section 9.8 for a detailed discussion of this statute.

12.21 Findings of Fact and Conclusions of Law by Judge or Referee*

*See Chapters 14 (review of referee's recommended findings and conclusions) and 15 (rehearings).

Subchapter 5.900 of the Michigan Court Rules does not have a specific court rule dealing with findings of fact and conclusions of law by a judge or referee in a nonjury trial.

MCL 712A.10(1)(c); MSA 27.3178(598.10)(1)(c), states that a referee must "make a written signed report to the judge . . . containing a summary of the testimony taken and a recommendation for the court's findings . . . ."*

*See Forms JC 13 and JC 59.

12.22 Records of Proceedings at Adjudicative Hearings

A record of proceedings on the formal calendar must be made and preserved by stenographic recording or by mechanical or electronic recording as provided by statute or MCR 8.108. MCR 5.925(B) and MCL 712A.17(1); MSA 27.3178(598.17)(1). Trials in child protective proceedings are on the formal calendar. See MCR 5.903(A)(6).

12.23 Notice to Courts With Prior Continuing Jurisdiction*

*See Section 3.16 for a more detailed discussion of this requirement.

Under MCL 712A.3a; MSA 27.3178(598.3a), where the child is subject to a prior or continuing order of any other court of this state, notice must be sent to such other court of any order subsequently entered under the Juvenile Code. See also MCR 5.927.